PREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-622

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICK R. MARCIANO, and JOAQUIN P. VILLAGOMEZ, *Petitioners,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; ROGERS C. B. MORTON, Secretary of Interior; STANLEY S. CARPENTER, Director of the Office of Territories of the Department of the Interior; EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands, *Respondents,*

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, the People of Saipan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 16, 1974.

THE OPINIONS BELOW

The opinion of the District Court for the District of Hawaii is reported at 356 F.Supp. 645, and also 5 E.R.C. 1159, and is set out in Appendix A. The opinion of the Court of Appeals, not yet officially reported, is reported at 6 E.R.C. 1952, and is set out in Appendix B. The order denying the petition for rehearing also is set out in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 16, 1974. A timely petition for rehearing was denied on September 3, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal courts have the power to review, under the National Environmental Policy Act, major actions of the Secretary of the Interior, and of Federal appointees under his supervision and direction, significantly affecting the quality of the human environment in the Trust Territory of the Pacific Islands.

2. Whether the doctrine of comity may properly be applied to relegate a case involving a substantial federal question to a court from which there is no possibility of ultimate review by the Supreme Court.

3. Whether a district court may find, on the basis of affidavits and testimony, that allegations in a complaint were unwarranted inferences of fact not to be taken as true on a motion to dismiss, without treating the motion as one for summary judgment and provid-

ing plaintiffs with a reasonable opportunity to present pertinent material.

STATUTORY PROVISIONS INVOLVED

The National Environmental Policy Act, subchapter I, 42 U.S.C. §§ 4321-4335 is set out in Appendix C.

The Trusteeship Agreement (61 Stat. 3301), 48 U.S.C. § 1681(a), Executive Order No. 11021 and Department of the Interior Order No. 2918 are set out in Appendix D.

STATEMENT OF THE CASE

The Trust Territory of the Pacific Islands, also known as Micronesia, consists of over 2,000 islands and islets distributed over some three million square miles of the western Pacific Ocean. The Trust Territory, which includes Saipan, is administered by the United States pursuant to an agreement between the United States and the United Nations, the Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665 (1947), under which the United States has "full powers of administration, legislation, and jurisdiction." App. D at 56a.

Direct responsibility for administration of the Trust Territory has been delegated to the Secretary of the Interior. 48 U.S.C. § 1681a; Executive Order No. 11021 (3 C.F.R. 1959-63 Comp. at 600). App. D at 61a. As a practical matter, much of the day to day administration is in the hands of the Director of the Office of Territories of the Department of the Interior and of the High Commissioner, appointed by the President with the advice and consent of the Senate. 48 U.S.C. § 1681a. Both of these latter officials exercise

their authority under the supervision and direction of the Secretary of the Interior. Department of Interior Order No. 2918, Part II, § 1. App. D at 56a.

The present dispute arose when the High Commissioner signed a long-term lease granting Continental Airlines, Inc. public land unique to the people of Saipan in its cultural, historical, and recreational significance, for the construction of a large resort hotel. Plaintiffs claimed that the High Commissioner is a federal agent and part of a federal agency and that his execution and implementation of this lease without an adequate and formal decisionmaking process, without consideration of the significant environmental and cultural impact of the hotel, and over the opposition of every official body elected by the people of Saipan, violates the National Environmental Policy Act. Both the District Court for the District of Hawaii and the Court of Appeals for the Ninth Circuit rejected plaintiffs' claim, finding that the governmental approval and execution of the lease were not "federal" action within the meaning of the National Environmental Policy Act. App. A at 22a; App. B at 33a.

Plaintiffs also contended that execution of the lease was an act of a United States government agency for which the Secretary of the Interior was responsible, and that therefore the Secretary was required to assure that such a lease be executed only after compliance with federal laws conditioning the exercise of powers by federal agencies. Thus, plaintiffs contended, the execution of the lease without compliance with NEPA would have been a violation of the Secretary's duties under NEPA even if he had no actual knowledge of the lease. Neither Court addressed this contention.

Plaintiffs further alleged that Secretary Morton, Director Carpenter of the Office of Territories and other Washington, D.C. Interior officials were aware of and directly involved in the decisionmaking process. The District Court found, on the basis of affidavits and testimony, that the allegations concerning involvement of such Department of Interior officials were unwarranted inferences of fact not to be taken as true on a motion to dismiss. In so finding, the District Court did not treat the motion to dismiss as one for summary judgment and accordingly neither provided the plaintiffs with the ten-day notice required by Rule 56(c) of the Federal Rules of Civil Procedure nor with the "reasonable opportunity to present all material made pertinent to such a motion by Rule 56" required by Rule 12(b) of the Federal Rules of Civil Procedure. The Court of Appeals did not discuss this ground of appeal other than to note, in discussing a different issue, that "the Secretary of the Interior assures us that his department did not participate in any way in the decision to grant a lease to Continental. . . ." App. B at 40a.

Another claim made by plaintiffs was based on the obligation of the United States under Article 6(2) of the Trusteeship Agreement to protect Micronesians against the loss of their lands and resources. The District Court held that the Trusteeship Agreement was not self-executing and that plaintiffs had no judicially enforceable rights thereunder. App. A. The Court of Appeals reversed this holding, but held that the doctrine of comity required that such rights be enforced in the High Court of the Trust Territory, a body created by and subordinate to the Secretary of the

Interior [1]. App. B at 39a. The question of comity had not been raised or briefed by any party and was not mentioned in oral argument. Plaintiffs' petition for rehearing on this point was denied by the Court of Appeals.

Jurisdiction in the United States District Court is based on the existence of federal questions under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and the Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, and an amount in controversy in excess of $10,000, pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

1. The National Environmental Policy Act Should Apply to Major Actions of the Secretary of the Interior and Federal Appointees Acting under His Supervision and Direction, When Such Actions Significantly Affect the Quality of the Human Environment

Section 4332 of Title 42, United States Code, specifies that *all agencies* of the Federal Government shall comply with the procedural requirements of the National Environmental Policy Act (NEPA).

The Secretary of the Interior asserts almost plenary administrative authority over Micronesia, comprising somewhat more than three million square miles of the earth's surface, an area larger than the forty-eight contiguous States. His actions and those of other fed-

[1] The Court of Appeals opinion permits plaintiffs to refile the action in the District Court for the District of Hawaii only upon an outright refusal by the High Court to find that it has power to review claimed violations of the Trusteeship Agreement. App. B at 41a. But without such a refusal, any decision of the High Court on the Trusteeship Agreement would not be reviewable in any federal court.

eral appointees acting under his supervision and direction thus have the potential of significantly affecting a very large environment indeed. The potential for unanticipated environmental and cultural impact, and the necessity for careful consideration of major actions in advance, is increased by the delicate ecology of the atolls, reefs, and islands of Micronesia, the varieties of cultures there and the general unfamiliarity of American administrators with Micronesian environment and cultures.

That the Congress of the United States was not solely concerned with environmental quality in the United States proper is clear from the language of NEPA. See 42 U.S.C. § 4332 (E), mandating agency recognition of the "worldwide and long-range character of environmental problems."

There is no question that Congress has the power to require the Department of Interior to comply with NEPA in its activities in the Trust Territory. Congress, in enacting NEPA, intended "to exert all the power it possessed in respect of the subject matter. . . ." *United States* v. *Standard Oil Co.*, 404 U.S. 558 (1972).

Nonetheless, the District Court and the Court of Appeals found that the actions of the High Commissioner, and any other Interior officials who may have been involved, were not the actions of a federal agency. App. A at 22a; App. B at 33a. Other Courts of Appeals have exempted the Environmental Protection Agency itself from the "all agencies of the Federal Government" requirement of NEPA. *See, e.g., Environmental Defense Fund* v. *Environmental Protection Agency*, 489 F.2d 1247, 1254-57 (D.C. Cir. 1973); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301, 1305-06 (10th Cir. 1973); *Getty Oil Co.* v. *Ruckelshaus*, 467

F.2d 349, 359 (3d Cir. 1972). But the decision below stands alone in exempting from the requirements of NEPA an agency deriving its authority from the federal government and whose primary mission is not the protection of the environment. Such an agency must comply with NEPA "to the fullest extent unless there is a clear conflict of *statutory* authority." *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). There is no such authority precluding compliance with NEPA by the High Commissioner.

Both courts below read the Administrative Procedure Act's exclusion of the governments of territories and possessions from judicial review under that Act to also preclude judicial review under NEPA. App. A at 22a; App. B at 33a. The gratuitous use of an APA exclusion to preclude review under NEPA, which contains no such exclusion, directly contradicts the purpose of the APA to expand, not to contract, the powers of federal courts to correct agency action which is contrary to federal law.

2. The Court of Appeals Should Not Have Committed the Decision of a Substantial Federal Question to a Court from Which There Is No Possibility of Ultimate Review by the Supreme Court

The Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, between the United States and the United Nations, was approved by the President on July 18, 1947, pursuant to the authority of a joint resolution of Congress of the same date. 61 Stat. 397 (1947). As such, the Trusteeship Agreement is a treaty and a law of the United States as those terms are used in 28 U.S.C.

§ 1331(a), the federal question jurisdictional statute. *B. Altman & Co.* v. *United States,* 224 U.S. 583 (1912). *See also United States* v. *Belmont,* 301 U.S. 324, 330-32 (1937).

The Court of Appeals found that the Trusteeship Agreement created judicially enforceable rights, but held that the doctrine of comity required that such rights be pursued in the High Court of the Trust Territory. App. B at 39a. Only if the High Court refused to hear the claim that the Trusteeship Agreement had been violated, would plaintiffs be permitted to refile the action in the District Court for Hawaii. Id. at 41a. Any other disposition of the case by the High Court, including an adverse interpretation of the Trusteeship Agreement, would not be reviewable in any federal court.

An examination of the High Court makes clear why the doctrine of comity should not be construed to require the ultimate and final interpretation of federal treaty obligations by that court. The High Court is a creature of one of the defendants in this case, the Secretary of the Interior. Dep't. of Interior Order No. 2918, Part IV. Its judges serve at the pleasure of the Secretary. *Id.* There is no statutory provision for review of its decisions by any federal court, including the Supreme Court. [2]

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[2] Of the territories of the United States, only American Samoa lacks access to the federal court system. 48 U.S.C. § 1661. See 28 U.S.C. §§ 41, 1291 (Canal Zone; Guam; Puerto Rico; Virgin Islands). See also Revisor's Note following 28 U.S.C. § 1294 (territories of Hawaii and Alaska); 34 Stat. 815 (U.S. Court for China); *Dorr* v. *United States,* 195 U.S. 138 (1904) (Philippines). The since repealed R.S. §§ 702, 1909-11 (1878) gave the Supreme Court appellate jurisdiction over the supreme court of any territory of the United States.

The notion of comity is used in two distinct senses in American jurisprudence. As between federal courts and state courts, comity is based on considerations of federalism, the recognition of the powers reserved to the states under the United States Constitution. *Younger* v. *Harris,* 401 U.S. 37, 44 (1971). In its second sense, comity describes the principles governing the deference given by one sovereign nation to the legislative, executive or judicial acts of another sovereign nation. *Hilton* v. *Guyot,* 159 U.S. 113 (1895). *See also Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 408-09 (1964). In neither sense does application of the doctrine of comity permit the referral of this case to the High Court of the Trust Territory.

No court other than the Court of Appeals below has considered whether the deference shown by federal courts toward state courts should also be shown toward the courts of the Trust Territory. The Supreme Court has considered, however, whether such comity should exist as between the federal courts and the courts of the territories of the United States. In holding the three-judge court statute inapplicable to the Territory of Hawaii, the Supreme Court held that the purpose of protecting state sovereignty was not furthered by treating the Territory of Hawaii as a state. *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 377-80 (1949). Where a federal claim is involved, the federal courts do not defer to the courts of a territory. *United States* v. *Fullard-Leo,* 331 U.S. 256, 268-270 (1947); *Yu Cong* v. *Trinidad,* 271 U.S. 500, 522-23 (1926). Because of the unique federal status of the Trust Territory and the direct United States responsibilities under the Trusteeship Agreement, there is even less reason here

for the federal courts to defer the resolution of federal claims to the courts of the Trust Territory. Relegation of such claims to the courts of the Trust Territory would lead to the anomalous situation in which ultimate review of a federal-question determination could not be sought in any federal court, including the Supreme Court of the United States.

Similarly, the principles of comity governing the relationship between the courts of different sovereign nations have no application to the present case. The District Court made clear that it did not regard the Trust Territory as a foreign country for purposes of sovereign immunity. App. A at 19a. The Court of Appeals, although not discussing that conclusion, in effect affirmed it. The authorities cited in the District Court's opinion establish that the Trust Territory possesses few, if any, of the attributes of an independent sovereign nation.

In effect, the Court of Appeals decision as to comity provides a result precisely opposite from the apparent intent of its holding that the Trusteeship Agreement is judicially enforceable. Application of comity, under the circumstances, makes Interior appointees the final arbiter as to the legality of its own conduct under applicable federal law. Such a situation is contrary to the most fundamental principles of American government and jurisprudence. Principles of comity should not govern the relationship between the United States federal courts and the High Court of the Trust Territory of the Pacific Islands. Petitioners believe they are entitled to a determination of their federal claims under the Trusteeship Agreement in a federal district court.

3. The Failure of the Court of Appeals To Correct the District Court's Reliance on Materials Outside the Complaint on a Motion To Dismiss Without Treating the Motion as One for Summary Judgment Calls for the Exercise of This Court's Power of Supervision

It is fundamental that well-pleaded material allegations in a complaint should be accepted as true unless it appears beyond doubt that plaintiffs can prove no set of facts that would support those allegations. *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957). It is equally fundamental that if the District Court intends to treat a motion to dismiss as one for summary judgment, plaintiffs must be provided with ten-day notice and a "reasonable opportunity to present all material made pertinent to such a motion." Federal Rules of Civil Procedure, Rules 12(b), 56(c); *Dale* v. *Hahn,* 440 F.2d 633, 638 & n. 9 (2d Cir. 1971).

The District Court found, on the basis of affidavits and testimony, that the allegations of the complaint concerning involvement of Department of the Interior officials located in Washington, D.C. were unwarranted inferences of fact not to be taken as true on a motion to dismiss.[3] App. A at 22a. Plaintiffs at no time were notified that the defendants' motions to dismiss were to be treated as motions for summary judgment and were not given an opportunity to present materials in support of the allegations in their complaint.

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[3] Plaintiffs' allegations were in no sense frivolous. Indeed, they were supported by official resolutions, cables and letters to and from Interior officials attached as exhibits to the complaint. These revealed that Interior officials in Washington were aware of the controversy concerning the lease and had consulted with the High Commissioner about it.

Throughout the proceedings leading up to the Court's Order, all concerned referred to, and apparently considered the motions as motions to dismiss, dealing only with questions of law. Indeed, the District Court captioned its opinion "Order Granting Motions to Dismiss." The District Court expressly relied upon this finding to hold that NEPA did not apply to the facts before it. Rather than correct such an error, the Court of Appeals extended it, by relying upon "assurances" of the Secretary of noninvolvement of "his department." Based upon this assurance, the Court applied the doctrine of comity to relegate the case to the Trust Territory High Court, despite recognition of High Court holdings that it lacks jurisdiction over agencies of the United States or its officers in the Trust Territory. App. B at 40a. The practical result is that plaintiffs have been deprived of their opportunity to attempt to prove allegations upon which they based important claims. They have had no day in court and there has effectively been a failure of due process as to such claims.

The failure of the Court of Appeals to correct the District Court's departure from the required procedure and its own improper reliance upon an assurance by a litigant as to a disputed question of fact, are of sufficient gravity to call for the exercise of this Court's supervisory power. See *Carter* v. *Stanton*, 405 U.S. 669 (1972).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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